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Renegotiating the Social Contract

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RENEGOTIATING THE SOCIAL CONTRACT

Review of MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010)*

JENNIFER S. HENDRICKS†

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Despite an economic recession and record levels of personal bankruptcy filings due to health care costs, President Obama's health care reform initiative sparked a season of protests.[1] Even a "public option"—not to mention a single-payer system—was off the table before the discussion really began.[2] As the question of the reform package's constitutionality wends its way to the

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[1] *See, e.g.,* Sid Salter, *Protesting in Boston an Old Tradition*, HATTIESBURG AMERICAN (Mar. 31, 2010), 2010 WLNR 10087997; Editors, *Protests Don't Promote Honest Debate on Healthcare: Healthcare Reforms Tarnished By Rowdy Protests*, MIAMI HERALD (Aug. 10, 2009).

[2] *See* Angie Drobnic Holan, *Public Option Was in Obama's Platform*, St. Petersburg Times (Dec. 23, 2009), 2009 WLNR 25877888 (discussing reaction to Obama's backing away from the public option).

Supreme Court,[3] it has become clear that a substantial segment of the American public does not want their government helping them stay alive.

In this climate, it is difficult to imagine an America in which the state is an accepted partner in meeting the challenges and responsibilities of family life; we seem to be reflexively opposed to the European-style social welfare state, "European-style" being understood as a term of denigration.[4] Democrats are confounded by the public's widespread adherence to an ideology of liberty that conflicts with self-interest.

In *The Supportive State: Families, Government, and America's Political Ideals*,[5] Maxine Eichner argues that part of this contradiction stems from flaws in our political theory. Modern political liberalism is premised on individual liberty as its highest value and non-intervention as the presumptive posture of the state.[6] This theory fails to account for individual vulnerability or collective interdependence.[7] As a result, proponents of social welfare programs lack a coherent theory of

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[3] Several cases have been filed challenging the constitutionality of the provision of the Patient Protection and Affordable Care Act that requires individuals to purchase health insurance. To date, there federal judges have concluded that this mandate is constitutional and two have concluded that it is not. *See* Mead v. Holder, _ F.Supp.2d _, 2011 WL 611139 (D.D.C. 2011) (constitutional); Fla. v. U.S. Dep't of Health & Human Servs., _ F.Supp.2d _, 2011 WL 285683 (N.D. Fla. 2011) (unconstitutional); Va. v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010) (unconstitutional); Liberty Univ., Inc. v. Geithner, _ F.Supp.2d _, 2010 WL 4860299 (W.D. Va. 2010) (constitutional); Thomas More L. Ctr. v. Obama, 720 F.Supp.2d 882 (E.D. Mich. 2010) (constitutional).

[4] *See, e.g.,* Ian Williams, *The West is Red: While Rebuking "European Style Socialism" John McCain Neglects to Mention That Europeans Enjoy a Higher Quality of Life*, THE GUARDIAN (Oct. 27, 2008), 2008 WLNR 27785475, *available at* http://www.guardian.co.uk/commentisfree/cifamerica/2008/oct/27/tax-obama-mccain-socialism (discussing John McCain's use of the term "European style socialism" on the campaign trail).

[5] MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010).

[6] *See id.* at 18 (describing John Rawls's theory of justice based on two principles, with liberty taking priority over equality).

[7] *See id.* at 21-22 (discussing liberalism's failure to focus on dependency).

the state on which to rest their arguments.[8] Because liberal theory hides vulnerability and dependence inside the private "black box" of the family, public support for vulnerability remains exceptional and stigmatized.

The Supportive State tackles this dilemma by rethinking liberal theory from the ground up, incorporating dependence and families rather than pushing them to the side. It is a careful, beautifully written renegotiation of the social contract on behalf of real people rather than the idealized, autonomous, but isolated rights-bearers who are the subjects of traditional liberalism.[9] Eichner preserves the best of liberal theory—its jealous concern for individual liberty, its premium on a diversity of human flourishing—while adding the complexity that the theory needs to cope with real lives. The result is an important contribution both to liberalism and the feminist theory, which in the past has focused primarily on criticizing liberalism for the failings that Eichner corrects.

This review discusses *The Supportive State* from the perspective of feminist theory and considers the extent to which Eichner has answered the concerns of both the critics and the defenders of liberalism. Part I describes the theoretical insights and innovations that are the core of the book's contribution to our understanding of families and the state. Parts II and III raise two, related questions about the implications of Eichner's theoretical arguments, the answers to which are likely to determine the degree to which her proposal gains acceptance among feminist liberals and critics. Part II suggests that Eichner's proposal offers a tradeoff between demanding that the state support families more but also justifying increased[10] state influence over certain family matters, especially sex

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[8] *See id.* at 38-43 (discussing the policy implications of the failure to take account of dependency).

[9] *See id.* at 3, 48-49 (describing the difference between reality and liberalism's moral ideal of the individual).

[10] It is probably more accurate to say that the state's influence under Eichner's theory would be more openly acknowledged and more principled, since, as Eichner demonstrates, the state already pervasively influences family life. Traditional liberalism, however, ignores rather than seeking to justify this influence. Influence

equality within the family. This tradeoff might make her proposals more appealing to feminist theorists who worry about the repercussions of Eichner's call for greater support for family caretaking. Part III argues that although Eichner's revised liberalism will raise some concerns about embracing the state's pervasive influence on family life, it represents a major accomplishment in developing a feminist theory of governance rather than only critique.

I. BRINGING FAMILIES INTO THE LIBERAL STATE

Eichner's ambitious project is to reconcile liberal political theory with feminist criticism, primarily the criticism that liberalism treats families as anomalous and pre-political while overlooking the important functions they serve. Liberalism focuses on the allocation of goods among independent citizens rather than on how those goods are brought into existence.[11] It assumes a public/private split in which families are expected to flourish autonomously, outside the principles of justice that apply in the public realm.[12] As Eichner sees it, these errors flow in part from liberalism's moral ideal of free and independent citizens, which neglects with the reality of human vulnerability and dependence.[13] A more useful version of liberalism—the supportive state—must not only acknowledge but incorporate that reality as an essential starting point. That is exactly what Eichner does in the first two chapters of *The Supportive State*, in which she develops a revised liberal theory of politics that corrects liberalism's long-standing neglect of families.

A. LIBERALISM'S BLIND SPOT

It has long been apparent that "[t]he child is the Achilles heel of liberal ideology."[14] The child challenges liberal theory because she is

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is increased under Eichner's theory as a matter of the theoretical justification, not as a matter of the facts on the ground.

[11] EICHNER, *supra* note 5, at 18-19 (describing John Rawls's failure to examine families and his assumption that children learn a sense of justice from their families "as if it occurred in a black box").

[12] *Id.* at 25-26.

[13] *Id.* at 3, 48-49.

[14] Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980). *See also* Anne C. Dailey, *Children's Constitutional Rights*, 96 MINN. L. REV. _, _ (forthcoming 2011) (discussing children's exclusion from liberal theory due to

an individual and a citizen, yet not the autonomous rights-bearer who is the subject of liberal theory. She is not yet able to exercise full autonomy. She is in need of care and education that will inevitably shape who she becomes and the apparently autonomous choices she makes. She is therefore the point of vulnerability—the Achilles heel—of a theory built on the liberty and equality of autonomous adults.

Feminist and other political theorists have revealed the irony of the Achilles metaphor.[15] Failing to account for children—about a quarter of the population[16]—is a serious problem, but the gap in liberal theory goes deeper. Not only children are vulnerable and in need of care. All of us depend on others for care and support to different degrees over the course of our lives. Even those of us who appear to most closely approximate the autonomous ideal are only an accident away from a high degree of visible dependence. Moreover, our inevitable dependence on others generates what Martha Fineman calls "derivative dependency."[17] That is, the vulnerable person who is in need of care requires a caretaker. The caretaker is thereby limited from engaging in other kinds of work. In our society, the expectation is that care will usually be provided and/or paid for within the family; if the caretaker is herself a family member, her derivative dependency will be addressed by the market activities of other family members.[18] Dependency is thus privatized within the

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their lack of capacity for autonomous choice and proposing a developmental theory for recognizing children's constitutional rights); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19 (1987) (noting the paradox that "society must indoctrinate children so they may be capable of autonomy").

[15] *See, e.g.*, SUSAN MILLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); MARTHA FINEMAN, THE AUTONOMY MYTH (2005); LINDA MCCLAIN, THE PLACE OF FAMILIES (2006); IAN SHAPIRO, DEMOCRATIC JUSTICE (2001); MICHAEL WARNER, THE TROUBLE WITH NORMAL (1999).

[16] U.S. Department of Health and Human Services, Health Resources and Services Administration, *Population of Children*, *available at* http://mchb.hrsa.gov/chusa07/popchar/pages/101pc.html (last visited 2/12/11).

[17] Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency,* 8 AM. U. J. GENDER SOC. POL'Y 13, 20 (2000).

[18] *See* Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1411 (2001).

family—and disappears from liberal political theory. Liberalism treats the head of the family as the autonomous individual who is the subject of the theory, while slighting what occurs in the black box of the family itself. Bringing families within the scope of analysis thus reveals that vulnerability is not just in the heel: it runs throughout the body politic. It is universal, inevitable, and inherent in the human condition. It is a fact with which no political theory should fail to grapple.

Eichner persuasively argues that liberalism's failure to grapple with vulnerability and dependency has important policy consequences in the United States today.[19] The paucity and political fragility of our social safety net, especially as compare to those of European nations, is well known. Eichner argues that U.S. law has "such difficulty protecting families" precisely because it rests on the assumptions of liberal theory "that individual liberty and equality are the goods appropriately cognized by law," but that "dependency is not a condition that law needs to recognize."[20] Defenders of social welfare programs are thus caught on their heels, without a coherent theory on which to build their call for state support of vulnerability. "The public philosophy by which we live cannot secure the liberty it promises"[21] because it cannot justify support for the caretaking that is a necessary precondition to the enjoyment of liberty.

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[19] EICHNER, *supra* note 5, at 38-43 (canvassing the effects in terms of parents' long hours at work, to the detriment of both their children and community institutions; high rates of child poverty; and reinforcement of sex inequality, particularly when mothers separate from the labor market).

[20] *Id.* at 27.

[21] MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 6 (1996), *quoted in* EICHNER, *supra* note 5, at 162. Sandel's full statement is, "The public philosophy by which we live cannot secure the liberty it promises, because it cannot inspire the sense of community and civic engagement that liberty requires." *The Supportive State* has strong communitarian components, and in several places Eichner discusses the need for state to structure institutions to better support civil society. For reasons of space and because my focus is on *The Supportive State*'s place in feminist theory, the communitarian aspects of the book receive less attention in this review.

B. EICHNER ADJUSTS THE MIRRORS

Eichner's starting point is liberalism's failure, thus far, to mount an adequate response to this criticism.[22] Nonetheless, Eichner finds much that is valuable in liberal theory. Rather than discard it entirely for its failings, she sets out to rehabilitate it. To do so, she draws not only on feminist criticisms but also on older strands of liberalism that are submerged in its modern, Rawlsian form. The two main revisions she proposes are: first, to set caretaking alongside liberty and equality as one of the basic values of and justifications for the state; and second, to theorize the family as a consistent and key part of the political structure rather than as an exception to the principles that govern in the public realm.

Classical liberalism recognized a broader range of social goods than liberty and equality, and it recognized that social institutions could foster civic virtue. Drawing on this tradition, Eichner argues that, once the fact of universal vulnerability is recognized, caretaking becomes just as important as liberty in the promotion of human dignity.[23] The state thus has a core responsibility to support the conditions necessary for human development. Recognizing that complete liberty is not possible, the state should nonetheless strive to enable each of its citizens to exercise autonomy.[24]

This commitment to support caretaking requires a transformation of the traditional liberal tenet that the state "must be neutral on … the question of the good life."[25] Rather than merely

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[22] *See* EICHNER, *supra* note 5, at 23-25 (discussing inadequacies in John Rawls's response to feminist criticism and attempt to incorporate families into his theory of justice).

[23] *Id.* at 49 ("Reframing liberal theory to recognize the fact of dependency makes it clear that the standard goods of liberty and equality recognized by contemporary liberal theory are not adequate to support human dignity. The dependency inherent in the human condition requires that caretaking and human development be added to this list.").

[24] Eichner defines the value of autonomy as "the belief that humans should be able to plan and pursue their own course in life. [I]t is not a condition that can simply be assumed and respected by the state through defending an individual's freedom to be left alone. Instead, it is an accomplishment that can only be achieved through complex systems of nurturance." EICHNER, *supra* note 5, at 49.

[25] *Id.*

standing back while citizens exercise their choices and intervening only to resolve conflicts and prevent domination, the state must actively support the particular social good of caretaking. Using Rawls's test of "public reason," Eichner argues that the state may and should be non-neutral on the value of caretaking.[26]

As the primary repository of caretaking, the family is now revealed to be a central institution of political organization, rather than standing outside of the realm of the social contract. Accordingly, Eichner turns to theorizing the family itself. In her supportive state, the family's role and responsibilities complement those of the state. While the state is responsible for structuring social institutions to support dependency, families are responsible for the day-to-day work and decisions involved in caretaking. The state's goal should be to make it possible for families to meet their caretaking needs "through exercising diligent but not Herculean efforts."[27]

A key strategy for meeting this goal is to protect the decisional autonomy of families from other institutions, especially the market. Here again, Eichner reaches for classical liberal theory, invoking the principle that power in one realm, such as the market, should not translate into domination of another realm, such as families. The state must limit market coercion that interferes with families' ability to perform their caretaking and developmental functions. Eichner persuasively argues that the state's performance of this function is critical to preserving family privacy, in the sense of decisional autonomy, since otherwise families can be left without the ability to make meaningful choices.[28]

Finally, the state must also concern itself with the internal dynamics of families, since the decisional autonomy of a family as a whole may be in conflict with the autonomy of individual members. As between the adult members of a family, the state's role is to ensure both equal power within the family and equal opportunity to

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[26] *Id.* at 51-53 (discussing the value of caretaking under the criteria of JOHN RAWLS, POLITICAL LIBERALISM 218, 223 (1993).
[27] EICHNER, *supra* note 5, at 79.
[28] *Id.* at 63-65.

exit. Accordingly, Eichner pays careful attention throughout her analysis of the state's obligation to ensure that its support for caretaking does not perpetuate inequality on the basis of sex.

With these guiding principles in place, Eichner proceeds to apply the revised social contract to a series of policy questions, ultimately producing a wide-ranging sketch of what the supportive state would look like. She argues for a guaranteed minimum standard of living for families with children and for work-family policies that realistically enable families to care for their dependency needs while protecting other social goods.[29] For example, she supports generous family leave policies but argues that each parent should be allowed a separate, non-transferable amount of leave; this arrangement supports caretaking but also promotes equality between parents both at home and in the market. Eichner also addresses difficult problems of family privacy and the rights of children within families, some of which are discussed in Part II, below.

Eichner also addresses the dependency needs of adults. She first discusses the needs of those who are most obviously dependent, such as the elderly.[30] She reminds the reader, however, that autonomy and vulnerability exist not as mutually exclusive states but on a spectrum; even those of us who most closely approximate the autonomous ideal need caretaking too.[31] She uses this insight to resolve what she presents as the most difficult question for the supportive state: whether and to what degree the state should recognize and even privilege particular relationships between adults,

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[29] *Id.* at 79 (minimum standard of welfare); *id.* at 82-83 (work-family policies under a public integration model, which presumes that all parents will also be market participants).

[30] *Id.* at 84-90 (discussing both the financial needs of the elderly and the personal need for caretaking).

[31] *Id.* at 101 (arguing that adults' need for caretaking "gives the state an important reason to support relationships between adults").

such as marriage.[32] She concludes that, within strictly defined limits, the state should encourage such relationships.[33]

The Supportive State is a masterful re-envisioning of liberal theory to incorporate the role of families. Eichner gracefully and methodically lays out the modifications that are needed. She then demonstrates how the new social contract can work in practice by applying it to difficult policy questions. Her policy conclusions are not necessarily dictated by the theoretical framework of the supportive state: as with any theory, the precise application of its principles and the correct balance among competing social goods could be debated. The most important contribution of the book is to provide a theoretical framework that is rooted in long-accepted political commitments to liberty while incorporating necessary corrections to reflect the reality of interdependence. The result is a new liberalism for the rest of us—those of us who need not just liberty but also care and relationships to flourish in this life.

II. EXCHANGING SUPPORT FOR INFLUENCE?

Support for caretaking work, especially the work of taking care of children, is the core of Eichner's supportive state. Eichner presents the supportive state as a third alternative to two extant feminist perspectives on the state's relationship to children and their parents.[34] One camp is represented by Martha Fineman and the other by Mary Anne Case and Katherine Franke. Eichner disagrees with some aspects of both theoretical perspectives, but her ultimate policy proposals more closely resemble Fineman's. My interest is this Part is to explore whether other aspects of Eichner's theory might nonetheless make it attractive to scholars like Case and Franke, who

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[32] *See id.* at 92 (focusing on the issues of "whether civil marriage should be retained as an institution" and "whether and how the state should seek to encourage two-parent families over single-parent families").

[33] *Id.* at 104-10. The limits focusing on protecting sex equality, avoiding stratification of wealth due to inheritance, and encouraging family engagement in civic life rather than retreat.

[34] *Id.* at 72-77 (discussing FINEMAN, *supra* note 15; Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 192-95 (2001)).

worry that subsidizing care entrenches sex inequality by perpetuating the gendered division of labor. I suggest that the supportive state's greater opportunities for promoting sex equality within the family offer an attractive trade-off to the potential downsides of subsidizing care.

A. THE DEBATE ABOUT SUBSIDIZING CARE

While feminists have taken a range of nuanced positions about the state's role with respect to family caretaking, for purposes of this discussion it suffices to say that both Fineman and Eichner are "pro" state support for care while Case and Franke are "against," or at least troubled.

Fineman has long championed the state's obligation to support both caretaking and caretakers. In her view, children are public goods, and society owes a debt to those who devote their resources to turning children into useful members of society.[35] Failure to pay this debt constitutes free-riding on the unpaid reproductive labor of families, especially mothers. While Eichner agrees with Fineman's emphasis on dependency and the need to support caretaking, she is more modest in her theoretical claims and policy proposals.[36] Eichner seeks a clearer delineation between state and family responsibility, and she sees children as public goods but also private ones, in that the parents also benefit from the relationship. Accordingly, although she endorses a range of family-friendly policies, she stops short of advocating that family members be compensated by the government for providing care.

Case and Franke object to supporting care work with public funds on two grounds. Eichner responds effectively to the first objection but could do more to meet the second.

First, Case argues that such support constitutes unfair favoritism to parents. She is more inclined to see children as public liabilities than as public goods, and she argues that parents have the primary responsibility for meeting children's needs.[37] Like Eichner, she

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[35] *See* FINEMAN, *supra* note 15, at xvii.
[36] *See* EICHNER, *supra* note 5, at 75-77 (explaining her points of disagreement with Fiineman).
[37] *See* Case, *supra* note 34, at 1785.

observes that many parents have children in order to fulfill their personal desires and visions of what constitutes a good life. Case, however, objects to making this particular vision of the good life a government priority. Although she does not object in theory to government expenditures for the benefit of children themselves, she opposes windfalls for parents.[38]

Eichner responds in three ways. The first is a structural critique that there is no "neutral position" for the state that leaves children to their parents resources in the first instance.[39] The status quo could as easily be described as actively undermining families rather than as a neutral regime. Second, Eichner's theoretical framework is based on a moral argument that the state should, to a certain extent, prefer caretaking to other activities; that is, she openly calls for revising liberalism's neutrality as to the good life.[40] That call must succeed or fail on its merits; I believe it succeeds. Third, if everyone agrees that helping children would be good, Eichner pleads that the windfall to parents is unavoidable and worth it.[41]

Case's second objection, also made by Franke, is that support for caretaking would reinforce social norms that impose motherhood on women as their highest and most natural calling.[42] Here, Eichner responds empirically: "[W]e have long been conducting the experiment of denying state support for parenting that Case and Franke call for, and it has been a dismal failure for sex equality."[43]

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[38] *See id.* at 1784.
[39] EICHNER, *supra* note 5, at 73 ("[T]here is no neutral position in which the state can locate itself until 'after' families fail.").
[40] *Id.* at 74.
[41] *Id.* (noting that "children's interests can never be neatly disentangled from parents" but acknowledging the need for the burdens of caretaking to be distributed equitably).
[42] *See* Case, *supra* note 34, at 1756-60 (analyzing the risks of privatizing dependency at the level of individual employers); Franke, *supra* note 34, at 187-88 ("The normative distinction that sets up the altruism of mothers against the selfishness of Porsche drivers suffers from several weaknesses, not the least of which are the confusion between the social effect of a practice and an individual's motivation for engaging in the practice, and an impoverished account of the meanings of and relationships between social production, social reproduction, and consumption.").
[43] EICHNER, *supra* note 5, at 75.

Eichner is probably right that denial of state support will not stop most women from becoming mothers and that they will be worse off for it. This observation, however, does not really respond to Case and Franke's concern about coercing women into motherhood, and it appeals to a correlation that does not necessarily prove causation. Perhaps other factors currently perpetuate sex inequality, but more state support for care would entrench it further. Feminists like Case and Franke will need an additional reason to consider embracing the supportive state.

B. "FEMINIST FUNDAMENTALISM" AND THE SUPPORTIVE STATE

That additional reason might be found in another aspect of Eichner's proposal, Bringing the family within the scope of liberal theory means more than just recognizing and supporting the important work that families do. It means recognizing the need for justice within families as well as for them. For adult family members, the state does this by promoting equality in power and in exit opportunities. For children, the options are both more limited and more complex. Eichner addresses three questions of family privacy with respect to children: state intervention to protect children from abuse and neglect[44]; the possibility of recognizing legal rights by children against their parents[45]; and the state's interest in ensuring that children are educated in the liberal tradition.[46] The state's interest in the values transmitted through education is a potential counterweight to concerns that subsidizing care work could undermine sex equality.

As nsoted above, Eichner is sensitive throughout her analysis to the liberal state's secular commitment to sex equality. This concern resonates with Case's commitment to what she calls "feminist fundamentalism": "an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female

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[44] *Id.* at 119-25.
[45] *Id.* at 126-32.
[46] *Id.* at 133-41.

subordination or fixed sex roles."[47] Case argues that the fundamental commitment to sex equality operates as a constraint on governmental action. For example, government should not promote marriage if "marriage" includes a wife's duty to obey her husband; the state may promote only egalitarian marriage.[48] Along these lines, courts have rejected the claims of Christian fundamentalists that public education violates their religious freedom when it endorses sex equality.[49] Case would go further, arguing that it would be unconstitutional for the public schools to promote a non-egalitarian view of the sexes. "State-sponsored education is not merely permitted, but also required to refrain from promoting a message of inequality between men and women."[50]

A constraint on state action, however, can only do so much if the family remains the realm of the private. Case's commitment to traditional liberalism confines her analysis to accepted moments of governmental intervention in the family: areas such as hortatory government policy, public education, and custody suits. These moments, however, represent only small fragments of the replication of sex inequality within families, a problem liberal theory struggles to address. Although Case and a few others have argued, for example, that a state violates the equal protection clause when it tolerates home schooling that promotes intensely sexist values,[51] the Supreme Court has yet to recognize that a child's ideological interest is anything but subsumed within a claim of parental rights.[52] While

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[47] Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 382.
[48] *Id.* at 391.
[49] *See, e.g.,* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1062 (6th Cir. 1987), *discussed in* Case, *supra* note 47, at 393.
[50] Case, *supra* note 47, at 393; *see also* Jennifer S. Hendricks, *Teaching Values, Teaching Stereotypes: Sex Ed and Indoctrination in Public Schools,* 13 U. PENN. J. CONST. L. 589 (2011) (elaborating on the question of constitutional constraints on messages of sex inequality in public school curricula).
[51] *Id*. (citing JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 85-86 (1998); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 156 (2008).).
[52] *See, e.g.,* Wisc. v. Yoder, 406 U.S. 205, 235-36 (1972) (holding that the free exercise clause entitled Amish parents to an exemption from compulsory education laws for high school-age children). The closest the Supreme Court has come to

proclaiming that parents are not free "to make martyrs of their children,"[53] the Court has nonetheless restricted state intervention until well nigh the point of martyrdom. If the parents are in agreement about a family regime of sex inequality, the state's commitment to sex equality is thus constructed as opposing the unified first amendment rights of the parent and the child. The liberal state's commitment to neutrality on visions of the good life leads it to countenance and even support the rearing of children for sex inequality.[54]

The supportive state, however, departs from neutrality as part of its duty to ensure that children are capable of autonomy. It values caretaking not just in the abstract but *so that* children will have the opportunity to flourish as autonomous individuals. The supportive state thus has a duty to ensure that children become capable of autonomy. While Eichner argues that parents are entitled to transmit their own values to their children, the state must ensure that transmission does not become indoctrination, to the point at which the children become "ethically servile" to their parents.[55] Liberalism's protection for the parents' autonomy need not extend to allowing them to thwart the development of the children's own autonomy.[56] The state should therefore use other institutions, with as

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have to acknowledge the conflict between a child's autonomy and a parent's claim of parental rights was in Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004), the challenge to the inclusion of "under God" in the Pledge of Allegiance as recited in California public schools. The plaintiff's daughter and her mother opposed the lawsuit. The Supreme Court avoided the merits through a questionable ruling that the plaintiff lacked standing because the child's other parent had legal custody and thus was the only person entitled to bring suit on her behalf.

[53] Prince v. Mass., 321 U.S. 158, 170 (1944).

[54] *See* Case, *supra* note 47, at 401-06 (discussing the decision of Texas courts to return a group of children to their parents in a fundamentalist LDS colony that indoctrinated children of both sexes in the extreme subordination of women).

[55] EICHNER, *supra* note 5, at 138; *see also id.* at 137 ("Liberalism does not allow one person to serve simply as a pawn to satisfy another's life plan, even when the other person is a parent.").

[56] *Id.* at 138.

little intrusion as possible on families themselves, to ensure that children are adequately exposed to liberal values.[57]

The duty to support caretaking and the opportunity to ensure the capacity for autonomy are intertwined in the supportive state, so that accepting (or rejecting) one entails accepting (or rejecting) the other. Support for caretaking is based on the state's duty to enable the child and the caretaker to flourish, which is also the duty that underlies intervention in matters of education. The supportive state's resolution of the "Achilles heel" problem not only allows it to see into liberalism's blind spot (the family) but also to apply liberal values to what goes on there. Support for caretaking raises fewer concerns, in terms of its tendency to entrench gender roles, if it comes with increased opportunities for the state to foster egalitarian norms.

III. COUNTING ON THE BENEVOLENT STATE?

While the supportive state's greater ability to foster egalitarian norms may be attractive, it also raises an additional question about Eichner's model. The supportive state is, still, the state, which is traditionally an object of suspicion for both liberalism and critical theory.[58] Feminists, in particular, have recently struggled with questions about how to move from critique to governance as feminist ideas gain traction within legal institutions.[59] Eichner's move to a theory of governance entails a certain level of trust in the capacity of the state to be a force for good. To some, the supportive state will

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[57] For example, Eichner proposes that rather than ban home schooling that inculcates sexist values, the state could require attendance at an after-school program that promotes egalitarian values. *Id.* at 137.

[58] *See, e.g.,* Alice Ristroph and Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1272-73 (2010) (arguing that the family should not be theorized from the perspective of the state, so that regulations of the family are designed according to what is in the state's interest).

[59] Most prominently, Janet Halley has criticized "governance feminism" as one of the reasons to "take a break" from feminism. *See, e.g.,* Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminsim*, 29 HARV. J. L. & GENDER 335 (2006); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

appear prone to the sort of paternalism that can too easily turn to authoritarianism. The strength of Eichner's theoretical framework, however, lies in her creation of a legitimate supportive role for the state while simultaneously retaining at least as much protection for individual autonomy, in the traditional sense, as we have today. The supportive state thus represents the first explicit and successful attempt to reconcile feminist critique into a theory of the governing state.

As an example of the complex obligations of the supportive state, consider the prosecution of domestic violence. Under the traditional liberal model, violence within the family was "private," and state intervention was presumptively inappropriate. A great deal of feminist effort has gone into demonstrating the inadequacy and injustice of this response.[60] Treating the family as a "black box" allows for domination within it. Instead, the state must recognize the rights—and the claims to justice—of the individuals within the family.

Using such arguments, feminist activists have been remarkably successful in persuading many law enforcement authorities that domestic violence is a crime. In places, legal institutions have accepted the proposition that an assault is an assault, no matter the relationship between the assailant and the victim.[61] Moreover, an assault is a crime not only against the victim but also against the public order. This new perspective has led to a different problem for feminists: prosecution policies that disregard the wishes of the victim.[62] Once domestic violence victims win the right to call the police into the home, it seems they often lose the right to demand that they leave.

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[60] *See generally* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?*, 23 ST. LOUIS UNIV. PUB. L. REV. 7, 9-10, 13-14 (2004) (summarizing the development of legal responses to domestic violence since the 1970s).
[61] *See id.* at 13-15.
[62] *See id.* at 15-19 (describing the development of mandatory arrest and no-drop prosecution policies) *see also* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. L. REV. 1, 4 (2009) ("The autonomy of women who have been battered is the price of these policies.").

When I discuss domestic violence cases with my students, they are remarkably unsympathetic to a victim of domestic violence who wants the police to help her in an emergency but who also wants to preserve her relationship, whether for reasons of love, money, or other inter-dependence. They believe that she has a right to call the police if a crime is committed but should not be allowed to keep the policy "on call" while simultaneously returning to the relationship and refusing to cooperate with prosecution. They are vague about how the victim should address the factors that are keeping her attached to the relationship. Their arguments reflect the view that state involvement in the relationship is anomalous and should be discrete and contained.

By contrast, many domestic violence advocates see the problem differently and believe that domestic assaults need to be treated differently from other crimes—still seriously, but differently.[63] Aggressive prosecution may serve the needs of victims less well than emergency protection backed up by a range of other social services. Those services might give a victim of domestic violence the ability to leave the relationship, and the shift in power created by her ability to leave might also make it more feasible to stay.

Here, the supportive state dovetails nicely with the changes sought by activists on the ground. Because the supportive state has a theory of families, it neither treats the family as a "black box" nor tries to shoe-horn family relationships into other paradigms, such as a perpetrator and victim who are strangers to each other. Instead, it provides a framework for supporting the victim *and* enabling her autonomy. The supportive state would respect a decision to preserve the relationship while also doing all it could to ensure that this decision was truly autonomous because the means existed to exit. The state would attempt to meet the needs of both the victim and the perpetrator. For example, it might provide support resources of various kinds to the victim and mental health services to the perpetrator.

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[63] *See* Goodmark, *supra* note 60, at 45-48 (arguing for a broader spectrum of responses to domestic violence, within and beyond the legal system).

This approach has resonance with another advocacy movement, known as the therapeutic jurisprudence movement. Proponents of therapeutic jurisprudence believe that legal institutions should interact with individuals holistically rather than focusing on a discrete incident.[64] For example, a criminal charge can be an opportunity for the state to intervene with respect to the underlying causes of the person's criminal inclinations. Under therapeutic jurisprudence, the prosecutor, the defense lawyer, the judge, and social services providers should work together as a team to make a positive difference in the person's life.

Somewhat idealistic, even utopian, in its outlook, therapeutic jurisprudence is subject to criticism by those who represent the people the state wants to "help."[65] The sincere desire to help at some level can mask the power dynamics at work: the state still holds the trump card of coercion. While people accused of crimes are often in need of a variety of social services, tying those services to the moment of intervention by the criminal justice system is rarely in their interest. The goal of a criminal defense lawyer is more likely to be to remove the coercive arm of the state out of her client's life as quickly as possible, while looking elsewhere for the means to improve that life.[66]

The supportive state may often find itself in a similar position: trying to be a friend while standing ready to use force. For example, Eichner reviews the abysmal condition of our current child welfare system and argues that the supportive state would replace the emergency-oriented foster care system with long-term support services for families; it would alleviate the poverty that is the root

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[64] *See, e.g.,* David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOS. L. REV. 743, 743-45 (2005) (introducing the concept of therapeutic jurisprudence in the context of criminal defense; *id.* at 747-52 (discussing the criminal defense lawyer's role during the course of representation).

[65] *See, e.g.,* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007).

[66] *See id.* at 574-75, 578-79 (describing the defense lawyer's involvement with social services for the client and the risks of accepting court-supervised services, especially those that are available only after a guilty plea).

cause of many problems that are treated as abuse or neglect; and it would reduce the instances of the ultimate intervention, removing a child from her home.[67] It would do so not just as a response to families in crisis but as part of its overall mission of supporting the caretaking efforts of all families.

It is not clear, however, that a broader program of support would mean that the traditional objects of state coercion would be less coerced, or if the rest of us would face increased coercion as the price of support. Indeed, I have suggested above that the supportive state's ability to mildly coerce adherence to egalitarian gender norms is an attractive feature. Nonetheless, it is not only the Tea Party that becomes nervous at such a prospect. To many, the supportive state will appear to be too deeply involved in family life for comfort.

Eichner would respond that this level of involvement does not alter the status quo. The state is already deeply involved in shaping our family lives. By bringing that involvement out into the open, the supportive state would allow us to ponder that involvement with greater clarity and make conscious rather than implicit choices about it. Because the state's influence will be pervasive in any event, we should at least aspire to make it a positive force, and we should have a framework for talking about what it ought to be doing. The state is already intervening, and intervening badly; we need a new framework to see how it could do better.

In addition, Eichner would modify very little about family privacy as we know it today; she is as jealous of family autonomy as she is concerned for individual flourishing. She is opposed to parental consent requirements for reproductive and mental health services, but she would otherwise keep parental authority intact.[68] Her ultimate goal for the child welfare system is to keep families intact for the long term rather than to quickly decide they have failed and sever their ties.[69] Even in the realm of education, where she acknowledges the state's right and duty to ensure that children

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[67] *See* EICHNER, *supra* note 5, at 119 ("Instead of strong-arming families after a crisis has occurred, the state seeks to partner with parents so that families are less vulnerable to crises in the first place.").
[68] *Id.* at 126-32.
[69] *Id.* at 119.

receive a liberal education, she advocates methods that intrude as little as possible on competing values that parents may wish to transmit.[70]

Ultimately, however, the case for the supportive state rests on a strain of optimism that runs throughout the book—optimism about our capacities both individually and collectively. Unlike Holmes, Eichner would not design the state from the perspective of the "bad man"[71]; she is designing it for the rest of us. Her theory of parental authority, for example, is based on the premise that "most parents at most times" will sacrifice for the sake of their children."[72] If the subject of traditional liberalism is the idealized autonomous adult, Eichner's subject is different not merely because she is vulnerable and interdependent but also because she is presumed to value her relationships and to aspire to fulfill the obligations that arise from interdependency. Eichner presents society as consisting not of self-interested individuals who are out to get the most they can from others but of people who are doing their best to meet society's expectations of them.

Some of this optimism about human nature necessarily carries over into optimism about human ability to act collectively through the state. Developing a theory of the state necessarily entails imagining some sort of positive role for it to play. Feminism can try to remain entirely a theory of criticism, or it can get to work on developing its theory of governance. If this is what governance feminism looks like, I'll take it.

CONCLUSION

The Supportive State is an ambitious and beautifully executed reconstruction of political liberalism. It demonstrates that the liberal value of autonomy is not only preserved but strengthened when realities of vulnerability and dependence are

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[70] *Id.* at 136-37.

[71] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man …."); *but see* H.L.A. HART, THE CONCEPT OF LAW 39 (1961) ("Why should not law be equally if not more concerned with the 'puzzled man' or the 'ignorant man' who is willing to do what is required, if only he can be told what it is?").

[72] EICHNER, *supra* note 5, at 126.

taken into account. Implicitly, it calls upon theorists to embrace rather than avoid the complexity of people's lives, and it calls on activists to develop a long-term, coherent vision of the role of the state rather than try to shoehorn the policies of a supportive state into the ideology of an aloof one. Like any theory that imagines a positive role for the state, the supportive state requires a careful balance between collective and individual decision-making. Eichner strikes that balance brilliantly, producing a framework that should guide anyone who is interested in bringing the family and its caretaking functions out of the black box and into the realm of justice.